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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1936

No. 456

RAY INGELS, as Director of the Motor Vehicle Department of the State of California; HOWARD E. DEEMS, as Registrar of the Motor Vehicle Department of the State of California; JOHN C. CORBETT, FRED E. STEWART, R. E. COLLINS, RAY EDGAR and RAY L. RILEY, as members of the State Board of Equalization and constituting said board in the State of California; and E. SEYMOUR,

Appellants,

vs.

HOWARD MORF, doing business under the firm name and style of PACIFIC WHOLESALE AUTOMOBILE COMPANY; UNITED STATES FIDELITY AND GUARANTY COMPANY, a corporation; and CONTINENTAL CASUALTY COMPANY, a corporation,

Appellees.

REPLY BRIEF OF APPELLANTS
With Appendix

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REPLY BRIEF OF APPELLANTS

With Appendix

REASONS FOR FILING REPLY BRIEF

1.

After appellants' original brief was filed, the Supreme Court of the State of Idaho (the highest court

of the state) held on January 18, 1935, that the Idaho Caravan Act does not violate the United States Constitution. The Idaho Act is similar to the California Act, and Sections 1 and 2 of both acts are identical except for a few immaterial differences in phraseology. As the Idaho court's opinion has not been published yet, a copy of it is printed at the end of this reply brief as Appendix A, and a copy of the Idaho Caravan Act (Chapter 2, Extraordinary Session Laws of 1935) as Appendix B.

2.

It has always been appellants' understanding that an appellee's brief should point out specifically any claimed inaccuracies and omissions in the statement of facts in the appellants' brief in order that the court may have before it the precise claims of the parties with reference to the facts.

Appellee has not done this but has only made his own statement of the facts without, except in a few instances, pointing out wherein it differs from appellants' statement. It is respectfully submitted that appellee's statement of facts throughout his brief abounds in inaccuracies and omissions. Leaving the briefs in that situation would impose on the Court the necessity of finding out for itself, by a comparison of the statements, the parties' claims as to the record.

For the above and other reasons which will appear herein appellants believe they can be of service to the Court by filing a short reply brief.

APPELLEE'S STATEMENT OF THE FACTS

In the fourth paragraph on page 4 of appellee's brief appears the statement that a certain car "was driven singly, not in company with any other car, and not in caravan, procession or fleet." The same statement appears in the second paragraph on page 5 with reference to two cars joined in tandem.

There is absolutely nothing in the record that supports these statements. That these facts may be wholly immaterial is not important; it should first be determined what the true record facts are before proceeding to decide their materiality. These statements are evidently based upon the record furnished by Appendix A of appellee's motion for Diminution of the Record. Appendix A also appears on page 87 of appellee's brief.

The matter we are here objecting to cannot be supplied by Appendix A. It will be noticed that Appendix A recites that "Appellee's counsel commenced proof of the facts alleged in paragraphs VII and VIII of appellee's Bill," and then it appears that the very most that happened in any event was that appellants admitted at the trial the truth of the allegations of those paragraphs. The record can contain nothing more than appears in such paragraphs. And those two paragraphs of appellee's Bill (R. 4-6) do not contain any statement or even an inference that the cars in question were being driven "not in company with any other car, and not in caravan, procession or fleet." Therefore appellee's statements to that effect on pages 4 and 5 of his brief are absolutely unwarranted.

In the first and third paragraphs on page 5 and at

the top of page 6 of appellee's brief are statements to the effect that 30 to 40 per cent of the cars appellee brings into California are driven "alone, as a single unit, without having a car attached thereto, and not in company with any other cars coming into California." This is plainly not correct, as is pointed out at length in pages 45 to 49 of appellants' brief, where the evidence bearing on this point is fully analyzed. *And appellants' analysis is not in any way attacked or questioned by appellee.* Appellee makes this statement at several places in his brief without attempting to support it by an examination of the evidence, and without disputing the analysis of the evidence on pages 45 to 49 of appellants' brief. The evidence is, as we there point out, that according to appellee's own testimony the single cars appellee brings in are in the fleets scattered among the cars joined in two-car, tandem hook-ups. Such two-car hook-ups comprise 60 to 70 per cent of all of the cars appellee brings in, and the several single cars in each fleet (the fleets averaging 12 cars) make up the 30 to 40 per cent of the single cars appellee brings into the State of California.

The second sentence on page 7 of appellee's brief that "there is no particular hazard in driving an automobile with another towed to it," while a summary of what appellee testified on the subject, is not a true summary of the entire testimony on this matter. In appellants' brief (pp. 17-18) we stated in full appellee's conclusions that towing is not hazardous. However, there is much testimony in the record showing beyond any question the hazards and extra burdens imposed upon the highways by the towing

of caravan cars. (See pages 13-14 of appellants' original brief.)

Appellee's summaries of the testimony of appellants' witnesses, Dillon, Walsh and Cato, are very obviously incomplete. A few scattered statements have been restated in the form of conclusions without relation to their context and without even trying to present a complete and accurate statement of what these witnesses said. We refer the court to appellants' statement of the evidence (pp. 10-18 of appellants' original brief) and the Record, pp. 46-56.

It should be stated that the fifth word in the fourth line on page 8 of appellee's brief should not be "noticed" but should be "counted" (R. 49).

On page 9 of appellee's brief it is said: "There is caravaning of cars on their own wheels for the purpose of sale, intrastate within the State of California." But it should also be stated that the only evidence as to the source of any particular cars so moved is that they are cars recently caravaned into California and on which the caravan fee has been paid (R. 61). Rightly, then, the caravan law exempts such second and intrastate movement of such cars from a second imposition of the fee, by providing that it shall apply only to the incoming movement and not to later movements. The dissenting opinion below points this out clearly (R. 95). Also the further statement should be made that the intrastate movement is "small" and "what little there is of it" is of single cars not in fleets or groups (R. 54, 58).

The rest of page 9 of appellee's brief presents an utterly incorrect statement of the record because it

gives only brief portions detached from the rest of the witnesses' testimony. However, the true record can easily be ascertained by referring briefly to the Record page numbers supplied in appellee's statement, hence this reply brief will not be prolonged by repeating the Record.

In pages 10 to 13 of his brief, appellee sets out his idea of the issues in his summary of the argument. It will be noted that on these pages there appear again in several places the statement not supported by the record, as previously pointed out in this reply brief, that certain specifically described cars were moved into California not in company with any other car or cars.

For a statement of the issues, we refer the Court to the subject index at the commencement of appellants' original brief and to the summary of argument on pages 24 to 26 of such brief.

APPELLEE'S ARGUMENT—POINT I

Appellee analyzes the District Court's findings of fact at some length. It is apparent that appellee is unable to distinguish between conclusions of law and findings of fact. This is so plain as to require no further statement.

We think no purpose can be served by a detailed examination of appellee's theories as to the Court's findings, except in a few instances. On pages 17 to 19 of his brief, appellee goes into the question of fact as to the number of single cars not in caravan that he brings into the State. A sufficient answer to this question of fact is contained on pages 45 to 49 of appellants' original brief; and it should be noted

that although on pages 17 to 19 of appellee's brief he devotes considerable argument to this question, he does not in any way attempt to show that appellants' analysis is erroneous.

Appellants' statement which is attacked by appellee at the top of page 20 of appellee's brief, is based on the testimony of highway patrolman Walsh at the top of page 49, Record, in which Walsh said that the conditions he testified to were typical of the caravan movement and that he had only seen one caravan in a year and a half which was free from law violations.

Appellee's discussion of the costs of enforcement on pages 25 to 27 of his brief, overlooks many factors. The testimony of appellants' witnesses Cato and Bevins shows that many additional men other than those referred to in appellee's analysis are employed in administering and enforcing the Caravan Act. It requires the services of all highway patrolmen on the main highways of the State where caravaning is conducted. It is also to be noted that appellee did not attempt to cross examine the witness Bevins, or attempt in any way to contradict or discredit his testimony that the administration expense of issuing caravan permits is about $5.00 for each permit. The time for appellee to have examined and challenged this statement of a high state official of California was during the trial of the case.

On page 28 of his brief, appellee discusses finding of fact No. 25 (R. 41). This finding of fact is fully answered and shown to be without foundation on pages 45 to 49 of appellants' original brief, and as has been previously pointed out herein, ap-

pellee has made no answer whatsoever to that part of appellants' brief.

Also on page 28, appellee discusses finding of fact No. 26. To appellee's argument there are several answers. There is not one word of evidence, and appellee does not attempt to point to any, that there is any intrastate commerce of automobiles in twos coupled, or in fleets, for purpose of sale. The undisputed evidence is that the small number of vehicles moved intrastate on their own wheels for purpose of sale are moved singly, not in twos coupled, and not in caravan (R. 54, 57). An answer that goes to the fundamental purpose of appellee's argument is this: The only evidence as to the intrastate movement of any particular cars for purpose of sale is that testified to by appellee as to the movement of the cars that he brings into the State after they have reached his place of business and have come to rest in the State. This is an eloquent and decisive point in showing the propriety of requiring payment of the caravan fee only for the movement from without the State. If the fee were also required for the cars which appellee brings into the State and which move intrastate for purpose of sale on their own wheels after they have come to rest at Los Angeles, such cars would be subject to an additional $15.00 fee. Appellee's argument on pages 28 and 29 of his brief as to finding of fact No. 26, is a perfect justification of that feature of the Caravan Act.

APPELLEE'S POINT II COMMENCING ON PAGE 33 OF HIS BRIEF

Appellee's argument on pages 33 to 50 of his brief is completely answered in appellants' original brief,

particularly on pages 27 to 60 thereof. There are a few points in the above designated pages of appellee's brief, however, to which we desire briefly to call the Court's attention. At the top of page 35, appellee states that he is required upon arrival at the California boundary, to pay other registration and license fees in addition to the caravan fee before being permitted to operate his vehicles upon the highways of California. Appellee made no such complaint in his bill of complaint, and it is too plain for argument that under the law he can move a vehicle from the border to any place in the State or through the State by paying only the caravan fee. See Section 5 of the Caravan Act. It has been our understanding throughout this case that appellee could so move his cars by paying only the caravan fee, and appellee has never complained that he was being compelled to pay other registration or license fees for the caravan movement until such statement appeared in his brief. Admittedly, after the caravan journey has ceased and the car has come to rest in the State, the regular State registration and license fees must be paid when the car is sold. As a matter of fact, the statement at the top of page 36 of appellee's brief is a contradiction of the statement at the top of page 35 of his brief.

At the bottom of page 37 and at the top of page 38 of his brief, appellee erroneously states that appellants state on page 38 of their brief "that the validity of the tax with respect to the movement of single cars from without the State, upon their own wheels, for the purpose of sale, constitutes one of the principal issues of this case." Appellants' statement is that the inclusion of all cars, whether moved

singly or otherwise, within the terms of the Caravan Act, does not invalidate the Act, for the various reasons stated, commencing on page 27 of their brief.

The first paragraph on page 40 of appellee's brief introduces some entirely new testimony into the case. The place for appellee to have fully explained his testimony on this point was while on the witness stand. Certainly the Court cannot take judicial notice of the facts which appellee claims. Common knowledge, if we are going to indulge in this procedure for supplying facts, could be extended to include judicial notice that new car dealers sell their used cars, taken in trade on new cars, at their place of business where such transactions are consummated without any interstate movement.

On page 41 of his brief, appellee again proves the propriety of the provisions of the Caravan Act confining the fee exaction to the movement of cars from without the State.

On page 45 of his brief, appellee wants the Court to take judicial notice of something which is obviously not of common knowledge today, namely, that there are "over a half million house car trailers travelling over the highways of this nation." If complaints are made to the legislative bodies of the various states as to traffic hazard caused by the movement of house car trailers on the highways, undoubtedly appropriate legislative action will be taken as it has as to caravaning of motor vehicles. The same thing is to be said of appellee's argument on page 46. The classification made by the Caravan Act, however, is not to be nullified because these other new problems of highway regulation are also

arising *Kentucky Consol. Coke Co. vs. Taylor*, 234 U. S. 224.

The italicized quotation on page 47 of appellee's brief is directly contradicted by the only specific evidence in the Record on the exact point, in which it is made plain that the conditions of law violation and highway hazard are the rule in the caravan movement and that in a year and a half a highway patrolman had seen only one caravan free from law violation (R. 49).

APPELLEE'S POINT III COMMENCING ON PAGE 50 OF HIS BRIEF

This point is fully answered on pages 61 to 81 of appellants' brief, but there are a few statements in appellee's brief to which we wish to direct the Court's attention.

From the indignant tone in which he commences his argument at this point, it would appear that appellee forgets that he is using the public highways in the conduct of a private commercial business. Under appellee's own theory of the facts at least two-thirds of such business is conducted in the manner held to be subject to separate classification in *Moor vs. Bingaman*, 298 U. S. 407. And under a proper understanding of the facts and the fundamental reason for the caravaning business and the way that it is carried on, all of appellee's business is plainly subject to separate classification (Appellants' original brief, pages 27 to 61).

On page 51 of his brief, appellee recites parts of the testimony of appellants' witnesses Martland and Bevins. The entire answer to that is to read all of the testimony of such witnesses (R. 56-59). The

testimony of these witnesses and of Cato (R. 52-56), Dillon (R. 51), and Walsh (R. 46-51), clearly demonstrates that the legislature had before it the evidence as to the practices and hazards of caravaning. Cato and Martland testified as to these hazards before the legislative committee (R. 55, last sentence of second paragraph; R. 57).

But appellee overlooks the long established principle stated in *Stephenson* vs. *Binford*, 287 U. S. 251, with reference to another highway act:

> "It is enough to support its validity that, plainly, one of its aims is to conserve the highways. If the legislature had other or additional purposes, which, when considered apart, it had no constitutional power to make effective, that would not have the result of making the act invalid."

On pages 55 and 57 of his brief, appellee makes the wholly unwarranted assertions that in the District Court appellants attempted to justify the $15.00 fee solely as a police power regulatory fee and not as a charge for the use of the State's highways. It is difficult to understand why appellee makes this claim in view of the plain record. Thus, in Paragraphs VI and XIV of appellants' answer (R. 15, 19) appellants stated that the fee is a police power regulatory fee and also a charge exacted as compensation for the privilege of using the State's highways. Appellants have taken this position throughout the case. The District Court recognized that appellants pressed this claim as it stated in its opinion (R. 84, top of page) "the Deputy Attorney General argues that the highways belong to the people and that

their use for commercial purposes can be charged for * * *."

On page 56, appellee misquotes the Caravan Act. The Act provides in Section 5 that the caravan permit fee "shall be in lieu of all other registration fees *and license fees* for the use of public highways." The italicized words were omitted by appellee.

It is apparent in reading pages 57 to 69 of appellee's brief that appellee completely misunderstands the principles enunciated in *Morf* vs. *Bingaman*, 298 U. S. 407, and *Interstate Transit* vs. *Lindsey*, 283 U. S. 183. In *Morf* vs. *Bingaman, supra*, it was held that the use made of the fees obtained from a motor vehicle license act is immaterial in deciding whether the act requires a license for the privilege of using the highways, if the act contains any terms which show that the fee is so required. Thus, in that case it was held that the fee was exacted as a charge for the privilege of using the State's highways because the Act there in question made payment of the fee a condition precedent to the use of the highways. Chapter 402, with which we are here concerned, also requires payment of the fee as a condition precedent to the use of the State's highways. The New Mexico Act and the California Act are precisely alike in that respect. The reason the license fee was held invalid in *Interstate Transit* vs. *Lindsey, supra*, was because the statute there considered did not contain any feature which identified the fee as a charge for the privilege of using the highways. Payment of the fee was not required as a condition precedent to the use of the highways by the statute considered in that case. As this Court pointed out in both *Morf* vs. *Bingaman, supra*, and *Interstate Transit* vs. *Lind-*

sey, supra, the use of the fees collected for highway construction and maintenance is important only where there is no other feature in the Act showing that the fee is levied as a charge for the privilege of using the highways.

Consequently, in this case the point that the fees required by the Caravan Act are paid into the State general fund is of no importance because the Caravan Act expressly identifies the charge as one for the privilege of using the highways by making payment of the fee a condition precedent to the use of the highways. A reading of *Interstate Transit* vs. *Lindsey, supra*, will show that if the Act there in question had made payment of the fee a condition precedent to the use of the highways the Act would have been sustained as valid. The reason for the Court's discussion of the various features of the law in that case was to point out that the Act contained no feature showing that the fee was a charge for the privilege of using the highways.

APPELLEE'S POINTS IV, V, AND VI

In his point IV, commencing on page 69, appellee misunderstands appellants' argument, but it is evident by the argument appellee there makes that he has abandoned his contention which appellants answer in their original brief commencing on page 81.

In his point V, commencing on page 71 of his brief, appellee's reasoning is patently erroneous. At the bottom of page 71 he makes a statement obviously incorrect which we have heretofore answered in this reply brief.

At the bottom of page 72 is another erroneous

statement. The Act by its specific terms makes payment of the fee a condition precedent to the use of the highways.

Commencing on page 73 of his brief, under point VI, appellee discusses certain authorities, which he clearly misunderstands. On pages 74 and 75 he quotes from *Interstate Transit* vs. *Lindsey, supra* (283 U. S. 183). The part quoted on page 75 is devoted to a discussion of *one* of the possible indices of a charge required for the privilege of using the highways. The Court found that the license fee there in question did not meet that one test, namely, proportion of the charge to the amount of the use. The reason for the Court's discussion was to point out that the license fee considered in that case did not contain *any* feature which identified it as a charge for the privilege of using the highways. A consideration of that case, and of *Morf* vs. *Bingaman*, 298 U. S. 407, will show that if the Act involved in *Interstate Transit* vs. *Lindsey* had provided, as is provided in Chapter 402, that payment of the fee is a condition precedent to the use of the highways, the Act considered in the *Interstate Transit case* would have been held valid, regardless of its other provisions.

On pages 76 to 79 of his brief, appellee cites certain cases. In every one of them the principle is plainly stated that where the Act shows on its face that it imposes a police power regulatory fee, or a charge for the privilege of using the highways, or both, that the burden is on the one attacking it to show that it is unreasonable in amount.

The points argued from page 79 to the end of

appellee's brief have been fully covered on pages 27 to 61 of appellants' original brief.

Much of appellee's entire argument overlooks the familiar principle as to the respective functions of courts and legislatures expressed in *Stephenson* vs. *Binford*, 287 U. S. 251:

> "The assailed provisions, in this view, are not ends in and of themselves, but means to the legitimate end of conserving the highways. The extent to which, as means, they conduce to that end, the degree of their efficiency, the closeness of their relation to the end sought to be attained, are matters addressed to the sound judgment of the legislature, and not to that of the courts. It is enough if it can be seen that in any degree, or under any reasonably conceivable circumstances, there is an actual relation between the means and the end."

The decree of the District Court should be reversed.

Respectfully submitted,

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APPENDIX A

IN THE
SUPREME COURT
OF THE
STATE OF IDAHO
(No. 6367)

GEO. B. WALLACE, INC., a corporation; WENTWORTH & IRWIN, INC., a corporation; RAYMER MOTOR COMPANY, a corporation; D. E. WALLACE, doing business under the trade name and style of WALLACE BROTHERS; COHEN-ANDERSON MOTOR CO., INC., a corporation; LAMPING MOTORS, INC., a corporation; LEWIS & CULBERSON, INC., a corporation; TRANSPORT CORPORATION, a corporation; W. R. PADDOCK, doing business under the trade name and style of Paddock Motors Co.; ALLEN MOTOR COMPANY, a corporation; LINEHAM MOTOR CORPORATION, a corporation; CHARLES NELSON, doing business under the trade name and style of Charles Nelson Company; J. T. DAVIS, doing business under the trade name and style of Twin Falls Motor Company; MID-COLUMBIA GARAGE, INC., a corporation; WILLIAM H. McLOUGHLIN, doing business under the trade name and style of McLoughlin Auto Company; M. J. GOSS; FOSTER MOTOR CO., INC., a corporation; BOISE MOTOR CAR COMPANY, a corporation; for and in behalf of themselves and all others similarly situated,

Respondents,

vs.

EMMITT PFOST, as Commissioner of Law Enforcement of the State of Idaho,

Appellant,

and

R. M. LOGSDON, doing business under the firm name and style of Sunset Motor Company,

Intervener and Respondent.

Pocatello, Sept. Term, 1936.
Filed Jan. 18, 1937.
Clay Koelsch, *Clerk.*

Appeal from the District Court of the Third Judicial District, for Ada County. Hon. Charles E. Winstead, Judge.

Suit to obtain an injunction. Judgment for plaintiffs. *Reversed.*

Bert H. Miller, Attorney General, Ariel L. Crowley, Assistant Attorney General, and Lawrence R. Quinn, Assistant Attorney General, for Appellant.

Dean Driscoll, for Respondents.

BUDGE, J.

The Second Extraordinary Session of the 1935 Legislature enacted a law now commonly known as the "Caravan Act," (Chapter 2, Second Extraordinary Session Laws of 1935) levying a fee of $5.00 per caravaned automobile transported from without the State, on its own wheels or in tow of another motor vehicle, for the purpose of selling or offering the same for sale. This appeal by the Commissioner of Law Enforcement is from a final judgment entered after a trial on the merits in the District Court, enjoining the commissioner, as the officer charged with such duty, from enforcing as against respondents the "Caravan Act," on the ground that the same is unconstitutional under both State and Federal constitutions in several respects.

The action was originally instituted by four automobile dealers engaged in "caravaning" automobiles who brought the action "for and in behalf of themselves and all others similarly situated." Thereafter 13 additional automobile firms or dealers intervened for like relief, and one additional automobile company thereafter joined as plaintiff in an

amended complaint. Respondents are citizens and residents of either the State of Washington, Oregon or Idaho, all dealing in automobiles, with their repective places of business in one of said states. All drive or tow automobiles, new or used, singly or in groups, from eastern factories, or neighboring states in the case of used cars, to their respective places of business for the purpose of selling or offering the same for sale. A portion of respondents are resident automobile dealers and so licensed; others are non-residents or foreign automobile companies engaged in "caravaning" automobiles from without the state and through the state. Respondents alleged in the lower court and here contend to like effect that:

> "1. That the subject of the act was not specified in the proclamation convening the special session which enacted it, in violation of Section 9 of Article IV of the State Constitution (a point not sustained below).
>
> "2. That the subject of the act is not expressed in the title, in violation of Section 16 of Article III of the State Constitution (likewise overruled below).
>
> "3. That the act violates the commerce clause, Article 1, Sec. 8, of the United States Constitution.
>
> "4. That it (a) deprives plaintiffs of their liberty and property without due process of law, and (b) denies them the equal protection of the laws, in violation of the Fourteenth Amendment to the Constitution of the United States, and (c) the similar provisions of Section 13 of Article 1 of the State Constitution.
>
> "5. That it abridges the privileges and immunities of citizens of the United States, in violation of the Fourteenth Amendment.

"6. That it deprives citizens of states other than Idaho of the privileges and immunities enjoyed by citizens of Idaho, in violation of Section 2 of Article IV of the United States Constitution.

"7. That it is a toll for the use of Federal aid roads, as forbidden by the acts of Congress (also overruled below)."

The lower court's findings and conclusions were in favor of respondents, except as indicated above, and judgment was entered enjoining the Commissioner of Law Enforcement from enforcing as against respondents the "Caravan Act." Appellant sets forth 29 assignments of error, raising various questions. These assignments have been examined and we have concluded that the decisive questions involved are those hereinafter discussed and we think it unnecessary to discuss each assignment of error separately.

The record discloses there are at least two types or classes of respondents in this action with respect to their residence or place of doing business. On the one hand there are those respondents who are Idaho resident automobile dealers, regularly licensed as such, engaged in transporting automobiles from without the state, on their own wheels or in tow of another motor vehicle, for the purpose of selling or offering the same for sale, and who claim that the "Caravan Act" discriminates against them. On the other hand there are those respondents who are nonresidents or foreign companies or operators, not required to be licensed as dealers in Idaho, and who are engaged in transportation from without the state of motor vehicles, operating on their own

wheels or in tow of another motor vehicle, for the purpose of selling or offering the same for sale, and which foreign or non-resident persons or corporations transport their cars through and out of the state. These claim discrimination against themselves by reason of the failure of the "Caravan Act" to include within its terms commerce within the state and commerce originating in the state and moving out. These may best be considered separately and we shall first consider the claims of non-resident operators, who attack the validity of the statute, charging that it is repugnant to the commerce clause (Article I, Section 8), the Fourteenth Amendment to the Constitution of the United States, Section 13 of Article I of the State Constitution, and Section 2 of Article IV of the United States Constitution.

The "Caravan Act" (Chapter 2, Extraordinary Session Laws of 1935) recites that:

> "SECTION 1. The term 'caravaning' as used in this act shall mean the transportation from without the state of any motor vehicle operating on its own wheels or in tow of another motor vehicle for the purpose of selling or offering the same for sale to or by any agent, dealer, manufacturer's representative, purchaser, or prospective purchaser, *whether such agent, dealer, manufacturer's representative, purchaser, or prospective purchaser may be located within or without this state.*"

The statute then prohibits the use of the highways of the state for the "caravaning" of motor vehicles unless and until there shall have been secured from the Department of Law Enforcement of the State

of Idaho a special permit as herein authorized. The pertinent part of the statute reads:

> Be it enacted . . . No person shall use any highway in this state for transporting motor vehicles unless and until there shall first have been secured from the Department of Law Enforcement of the State of Idaho a special permit as to each vehicle so transported for use of the highways of this state in transporting such vehicle.
>
> Be it further . . . As a condition precedent to the issuance of any special permit provided for in Section Two of this Act, the Department of Law Enforcement of the State of Idaho shall charge and collect a fee of five dollars ($5.00) for each motor vehicle for which a carrying permit may be issued, whether such vehicle be operated under its own power or in tow of another motor vehicle.

Finances for the construction, maintenance and policing or regulation of traffic in the State of Idaho are derived in the main from various fees, licenses, taxes, and charges imposed upon motor vehicle operators, such as fees for the registration of motor vehicles owned or used in this state, (I. C. A., Section 48-127), (I. C. A., Section 39-411), operator's licenses, (Chapter 88, 1935 Session Laws), taxes on the sale of motor fuel (Chapter 46, 1933 Session Laws), automobile dealer's license (I. C. A., Section 48-130, as amended chap. 30 and chap. 152, 1935 Session Laws), certificates of title (I. C. A., Section 48-406), fines and penalties for violations of the motor vehicle laws, ad valorem taxes and other sources.

It may be conceded that respondents, non-resi-

dents pay certain taxes imposed alike on those engaged in using automobiles in the State of Idaho whether residents or non-residents, such as the tax on motor fuel. However prior to the enactment of the Carroll Act foreign and non-resident corporations or persons engaged in the transportation of motor vehicles on their own wheels or in tow of another motor vehicle from without the State for the purpose of selling or offering the same for sale were required to pay the registration license fee or automobile dealer's license fee for the privilege of using the highways of the State such as was imposed upon resident automobile dealers by I. C. A. Section 48-310 as amended, and chap. 152, 1935 Session Laws and I. C. A. Section 48-406 (e). It is well settled that a State may impose a charge, registration or license fee, on those using motor vehicles in the State although engaged in interstate commerce, as compensation for the use of the public highways, which is a fair contribution to the cost of constructing and maintaining them and regulating the traffic thereon. *Hicklin v. Bruneau* 12 F. Supp. 758; *Interstate Busses Corporation v. Blodgett* 276 U. S. 245, 48 S. Ct. 230, 72 L. Ed. 556; *Henderson v. Mayor* 92 U. S. 259, 23 L. Ed. 543; *Lane v. New Jersey* 262 U. S. 552, 43 S. Ct. 650, 67 L. Ed. 1117; *Interstate Busses Corp. v. Lindsey* 278 U. S. 168, 73 L. Ed. 254, 49 S. Ct. 102; *Aero Mayflower Transit Co. v. Georgia Public Service Commission* 295 U. S. 285, 55 S. Ct. 709, 79 L. Ed. 1439; *Aero v. Brennan* 80 L. Ed. 1284, 299 U. S. 407; *Aero v. Lewis* 24 F. Supp. 922 at 932 (dissenting opinion).

The statutes imposing a tax, fee or license upon resident automobile dealers and the Caravan Tax, (Chapter 2, Second extraordinary Session Laws of 1935) imposing a tax, license or fee upon non-resident persons or corporations engaged in transportation of motor vehicles in interstate commerce on their own wheels or in tow of another motor vehicle, for the purpose of selling or offering the same for sale, are complementary in the sense that while both levy a tax, license or fee for the privilege of the use of the highways of the State with relation to the sale of motor vehicles, the receipts to be expended for highway maintenance, construction and policing, one affects only resident automobile dealers and the other affects non-resident dealers, corporations or persons who are not required to be licensed as a resident automobile dealer. Discrimination is not shown as between these by merely showing that the two statutes are different in form or adopt a different measure or method of assessment. The firmly established rule placed the burden upon the non-resident persons, corporations or dealers, engaged in "caravaning" automobiles to both plead and prove, not only that the tax is inapplicable to intrastate commerce, but that in actual practice the tax falls upon interstate commerce with an economic weight disproportionate to the burden of taxation imposed upon intrastate commerce. (*Interstate Busses Corporation* vs. *Blodgett, supra; General American Tank Car Corp.* vs. *Day*, 270 U. S. 367, 70 L. Ed. 635, 46 S. Ct. 234; *Hendrick* vs. *Maryland*, 235 U. S. 610, 59 L. Ed. 365, 35 S. Ct. 140; *Interstate Busses Corp.* vs. *Holyoke Street Ry. Co.*, 273 U. S. 45, 51 47 S. Ct. 298, 71 L. Ed. 530, 534.)

The complaint in this case contains no averment of disproportionate economic burden, and the findings of fact, if sufficient in form (which it is not necessary to decide) do not purport to find that a disproportionate economic burden exists; nor did the respondents make any effort, either by pleading or proof, to demonstrate the existence of such unequal economic burden. In disposing of a similar case upon the same ground the Supreme Court of the United States said in *Interstate Busses Corporation vs. Blodgett*, *supra*:

> "To gain the relief for which it prays, appellant is under the necessity of showing that in actual practice the tax falls with disproportionate economic weight on it. . . . The record does not show that it made any attempt to do so."

Failing to bear the burden cast upon them in this relation, the judgment in favor of non-resident respondents is unsupported by the record, and must be reversed.

It appears that the same conclusion must be reached with reference to the transportation of motor vehicles from within the state on their own wheels or in tow of another motor vehicle for the purpose of selling or offering the same for sale. There is no showing that automobiles are manufactured in this state. There is evidence of isolated cases where new automobiles have been transported from within the state from resident dealers' places of business, for the purpose of resale and possible transportation of used automobiles from within the state for the purpose of resale. The evidence also discloses that ordinarily such used cars already bear

state licenses, and it appears that in the case of the new automobiles a fee privileging their use of the highways of the state had already been exacted in the payment of resident dealers' license or Caravan Tax upon their coming into the state. A quantum of business, such as would defeat the classification as made by the legislature, does not appear to have been shown; and it further appears that respondents in this relation did not demonstrate actual discrimination or the existence of unequal economic burden. We are satisfied that the act is not repugnant to, or in conflict with, any of the various constitutional provisions urged by such respondents, and heretofore enumerated.

Coming now to the question of the constitutionality of the act when applied to resident dealers actively engaged in caravaning, Section 1 of the act provides:

> "The term 'caravaning' as used in this act shall mean the transportation from without the state of any motor vehicle operating on its own wheels or in tow of another motor vehicle for the purpose of selling or offering the same for sale to or by any agent, dealer, manufacturer's representative, purchaser, or prospective purchaser, *whether such agent, dealer, manufacturer's representative, purchaser, or prospective purchaser may be located within or without this state. . . .*"

Construing the language as used in the italicized portion of section 1 of the act strictly in accordance with the language there used, it would seem that it was the intention of the legislature to impose the caravan tax upon both interstate automobile deal-

ers, engaged in caravaning, and resident automobile dealers, engaged in the same traffic, or caravaning. The act provides, as will be observed, that it shall be effective "whether such agent, dealer, manufacturer's representative, purchaser, or prospective purchaser may be located *within or without this state.*" The act does not provide that it shall apply only to interstate automobile dealers caravaning cars from without this state. The act makes no distinction as between automobile dealers caravaning, whether they be located within or without this state. While it may be insisted that the tax can not be constitutionally imposed, where the motor vehicles caravaned are brought into the state to be sold or offered for sale by resident dealers, for the reason that it would exact from such resident dealers, in addition to other taxes they are required to pay, the added burden of the caravan tax and thus placing a double burden of taxation upon such resident dealers transporting from without the state any motor vehicles in the manner specified in section 1 of the act. It cannot be gainsaid that the resident automobile dealer caravaning will be required to pay, not only other taxes exacted under various statutory provisions, but also the caravan tax. However, it does not necessarily follow that the act would be unconstitutional for this reason. Article 7, Section 5, of the Constitution, does not prohibit dual taxation of property unless it relates to ad valorem taxes. (*State* vs. *Doherty*, 3 Ida. 384, 29 Pac. 855; *State* vs. *Union Central Life Insurance Co.*, 8 Ida. 240, 67 Pac. 647; *State* vs. *Jones*, 9 Ida. 693, 75 Pac. 819; *In re Gale*, 14 Ida. 761, 95 Pac. 679; *Northern Pacific Railway Co.* vs. *Gifford*, 25 Ida. 196, 136 Pac.

1131; *In re Kessler*, 26 Ida. 764, 146 Pac. 113; *Hartman* vs. *Meier*, 39 Ida. 261, 227 Pac. 25; *Smallwood* vs. *Jeter*, 42 Ida. 169, 244 Pac. 149; *Diefendorf* vs. *Gallet*, 51 Ida. 619, 10 Pac. (2d) 307; *J. C. Penney Co.* vs. *Diefendorf*, 54 Ida. 374, 32 Pac. (2d) 784; *Garrett Transfer, etc. Co.* vs. *Pfost*, 54 Ida. 576, 33 Pac. (2d) 743.) The caravan tax does not exact an ad valorem tax, but an excise or license tax.

From the language used in section 1 of the caravan act, supra, it may be logically contended that the legislature, when enacting the caravan act, was of the opinion that the registration and licensing of local dealers related in no way to caravaning cars either into or across the state; and that in so far as the local dealer was concerned he was at that time on an equality with and in the same position as the non-resident dealer with respect to the caravaning of cars as defined in the act they were about to pass. The act does not pretend to cover the movement of cars wholly within the state, but confines the meaning of the term to cars only from without the state. This leaves local owners and dealers at liberty to operate, move and transport cars from place to place, wholly within the state, the same as before the passage of the act and without reference to compliance with the terms of the caravan act. Now, conceding that the imposition of a license fee or tax, on all cars brought into the state by the means and for the purposes designated in the act (Section 1), is not a discrimination against interstate commerce or in violation of the commerce clause of the Constitution (Article 1, section 8), and is valid under the holding in *Morf* vs. *Bingaman*, 80 L. Ed. 1245, it is not apparent how or why the exaction of a fee from

a resident dealer engaged in "caravaning," as defined in the act, is any discrimination against him and in favor of a non-resident dealer doing the same thing. The fact that the local dealer has paid his registration fee and has acquired his allotted number of dealer's plates, which he may attach to cars he moves on the state highways, does not and should not protect him after he goes out into a foreign state and brings into this state a caravan of cars "for the purpose of selling or offering the same for sale" and by such means subjecting the state highways to an additional load or burden to which his local dealer's license could not subject them, except for someone caravaning these additional cars into the state. The non-resident dealer who caravans cars into or through Idaho by only paying the caravan tax does not acquire like privileges enjoyed by the resident dealer under registration as a domestic or local dealer. The requirement that the resident dealer pay the same fee or license tax for caravaning as exacted from the non-resident is not an unreasonable or unfair discrimination against either for the reasons heretofore stated. (*Morf* vs. *Bingaman, supra.*) Construing the language as used in Subdivision 1 of the act, it would seem to warrant the conclusion that it has application to all persons, corporations, partnerships or whatnot, either resident or foreign dealers who caravan cars from without the state into the state or through the state.

The caravan tax is imposed for the privilege accorded the caravaner to enter upon the highways of the state and for the privilege of the use of its roads and to compensate the state for the extra costs for the construction, maintenance and policing of the

state highways, and is expended by the state for that purpose.

We take judicial notice of the fact that there are no manufacturing plants in this state for the building and construction of automobiles and transporting the same from within to without the state. It further appears from the record that caravaning from within to without the state by domestic automobile dealers is so negligible as to justify the conclusion that there is no discrimination in favor of domestic dealers engaged in the traffic of caravaning as would warrant the holding that the act is unconstitutional, for the reason that it discriminates between interstate automobile dealers and domestic dealers caravaning from without to within the state.

We are not unmindful of the rule, as heretofore announced by this court, that in construing a statute, attacked on the ground of its constitutionality, the court must adopt such a construction as will sustain its constitutionality if reasonably possible. (*Achenbach* vs. *Kincaid*, 23 Ida. 768, 140 Pac. 529; *Smallwood* vs. *Jeter*, 43 Ida. 169, 244 Pac. 149; *Williams* vs. *Baldridge*, 48 Ida. 618, 284 Pac. 203; *J. C. Penney & Co.* vs. *Diefendorf*, 54 Ida. 374, 32 Pac. (2d) 784.)

The judgment is reversed and the cause remanded with instructions to the trial court to enter findings, conclusions and judgment in accordance herewith.

Morgan, C. J., and Holden, Ailshie, and Givens, J., concur.

APPENDIX B

(Chapter 2, Second Extraordinary Session Laws of Idaho of 1935—Idaho Caravan Act).

AN ACT

TO REGULATE THE CARAVANING OF MOTOR VEHICLES UPON THE PUBLIC HIGHWAYS OF THE STATE OF IDAHO; DEFINING THE TERM "CARAVANING"; PROVIDING FOR THE LICENSING OF MOTOR VEHICLES IN CARAVANS AND FIXING THE FEE THEREFOR; DEFINING THE DUTIES OF THE DEPARTMENT OF LAW ENFORCEMENT IN REGARD THERETO; CREATING THE "MOTOR VEHICLE CARAVAN FUND" IN THE STATE TREASURY AND PROVIDING FOR THE DISBURSEMENT OF SUCH FUND; IMPOSING PENALTIES FOR VIOLATION OF THIS ACT; AND DECLARING AN EMERGENCY.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF IDAHO:

SECTION 1. The term "caravaning" as used in this act shall mean the transportation from without the state of any motor vehicle operating on its own wheels or in tow of another motor vehicle for the purpose of selling or offering the same for sale to or by any agent, dealer, manufacturer's representative, purchaser, of prospective purchaser, whether such agent, dealer, manufacturer's representative, purchaser or prospective purchaser may be located within or without this state. The caravaning of motor vehicles as herein defined shall be considered as the transportation of property for hire by motor vehicle upon the public highways of this state.

The term "person" when used in this act shall be construed to mean any person, firm, association, partnership, corporation, lessee, trustee, receiver, or company engaged in or intending to engage in the business of caravaning as defined in this act.

SECTION 2. No person shall use any highway in this state for caravaning motor vehicles unless and until there shall first have been secured from the Department of Law Enforcement of the State of Idaho a special permit as to each vehicle so caravaned for use of the highways of this state in caravaning such vehicle, which permit shall be dis-

played by posting the same upon the windshield of each such vehicle or in other prominent place thereon, where it may be readily legible. It shall be unlawful to operate a motor vehicle or group of motor vehicles in caravaning unless a space of at least 150 feet shall at all times be maintained between each vehicle or group of vehicles being so caravaned, a group being defined as one motor vehicle operated under its own power with one motor vehicle in tow.

SECTION 3. As a condition precedent to the issuance of any special permit provided for in Section Two of this act, the Department of Law Enforcement of the State of Idaho shall charge and collect a fee of five dollars ($5.00) for each motor vehicle for which a caravaning permit may be issued, whether such vehicle be operated under its own power or in tow of another motor vehicle; provided, however, that no such permit shall be issued by said Department of Law Enforcement unless and until the applicant therefore shall have produced evidence to the satisfaction of said Department of Law Enforcement that all of the laws of this state relating to the transportation of property upon the public highways for hire shall have been complied with.

SECTION 4. No permit issued under this act for caravaning motor vehicles shall be transferable either as between persons or as to the vehicle for which it is issued, and shall only be valid for the trip to be specified in said permit; and in no event shall such permit be valid for a period of more than thirty (30) days after it shall have been issued. Such permit shall contain such information and be in such form and shall be issued under such rules and regulations as may be prescribed by said Department of Law Enforcement. Such permit shall be conditioned upon the permittee's complying with all of the laws of the State of Idaho and of the United States.

SECTION 5. The fee paid for any caravaning permit issued under this act shall be in lieu of all other registration fees and license fees for the use of public highways in this state by any motor vehicle during the period that such motor vehicle may be operated under and in accordance with such permit upon the public highways in this state; provided, however, that nothing in this section shall exempt the owner or operator of such vehicle from compliance, except with respect to fees or license charges, with all of the laws of this state now or hereafter adopted, relating to the transportation of property for hire.

SECTION 6. There is hereby created in the state treasury a fund to be known as the "Motor Vehicle Caravan Fund" and all fees collected by the Department of Law Enforcement under this act shall be paid into said fund. The moneys derived by the provisions of this act are intended for the added expense which the state may incur in the administration and enforcement of this act and the added expense of policing the highways over which such caravaning may be conducted and to compensate the state for the additional cost of maintenance of such highways, so as to provide for the safety of traffic on such highway where caravaning is being conducted.

SECTION 7. The Department of Law Enforcement is charged with the administration and enforcement of this act, and, with the approval of the Governor, is authorized to employ such additional clerical and other assistance as shall be necessary for the administration and enforcement of this act, such clerical and other assistants to be paid such compensation as may be fixed by the Department of Law Enforcement from said Motor Vehicle Caravan Fund.

SECTION 8. Any moneys remaining in said Motor Vehicle Caravan Fund on the 31st day of December of each year, after the payment of such added expense in the administration and enforcement of this act and the added expense of policing said highways, shall be transferred to and become a part of the State Highway Fund in the State Treasury.

SECTION 9. All moneys accruing to said Motor Vehicle Caravan Fund are hereby appropriated to the purposes aforesaid.

SECTION 10. Any violation of the provisions of this act is a misdemeanor punishable by a fine of not less than $50.00 nor more than $300.00 or by imprisonment in the county jail for not more than six (6) months or by both such fine or imprisonment.

SECTION 11. An emergency existing therefor, which emergency is hereby declared to exist, this act shall be in full force and effect from and after its passage and approval.